Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

BENJAMIN G. SPRECHER,

Petitioner,

-against-

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN G. SPRECHER
Pro-Se
138-49 77th Avenue
Flushing, New York 11367
(718) 268-5598

47 pp

QUESTIONS PRESENTED

1. Whether a criminal conviction for conspiracy to violate the registration provisions of the securities laws provides *collateral estoppel* or *res judicata* with respect to determinations by the district court which were not necessary for the conviction.
2. Whether affiliate status under 15 U.S.C. 77(b) is determined by "influence" rather than "control".
3. Whether any false statement concerning "who had control" and "merger negotiations" are "material" as a matter of law to satisfy the requirement of "materiality" under 17 C.F.R. 240.10b-5.
4. Whether it offends the double jeopardy and due process clauses of the Constitution for the government to request and the district court to grant disgorgement without a hearing based solely on a criminal conviction when the criminal court failed to grant restitution pursuant to the government's request.
5. Whether a permanent injunction barring an individual from being an officer can be imposed by an appeals court based upon the inherent power of the district court when the district court did not impose the bar based upon its inherent power and the district court failed to hold a hearing as to the appropriateness of such an injunction, and when the individual's wrongdoing had no relationship to his being an officer (indeed, he was not an officer) and, in fact, his wrongdoing was antithetical to being an officer; and whether under such circumstances the officer bar injunction was a penalty - a prohibited use of the injunctive power of the court.

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BENJAMIN G. SPRECHER,

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v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Benjamin G. Sprecher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals and the order denying rehearing (*infra*, Appendix ["A"] A1-A10) are unreported. The opinion of the district court (A10-A16) also is unreported.

JURISDICTION

The court of appeals entered its judgment on April 9, 1996 (A1) and denied rehearing on May 17, 1996 (A9-A10). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides, "...nor shall any person be subject for the same offense to be twice put in jeopardy... be deprived of life, liberty, or property, without due process of law."

15 U.S.C. Section 77b(j) provides, in relevant part, the following:

> "[An underwriter] is any person who has purchased from an issuer (defined to include a control person) with a view to, or offer or sells for an issuer in connection with the distribution of any security."

STATEMENT

Background

Criminal Conviction

On January 9, 1992, Petitioner, Benjamin G. Sprecher ("Sprecher") was convicted of various criminal charges (*U.S. v. Sprecher*, 783 F.Supp. 133 [S.D.N.Y. 1993]). Particularly, Petitioner was convicted of *conspiracy* to violate the registration provisions of the Securities Act of 1933 (15 U.S.C. 77) ("Act") and violations of 18 U.S.C. 1001 ("1001") with respect to certain statements filed with the United States Securities and Exchange Commission ("SEC"). The convicting court held that with regard to violations of 1001, materiality was not an element of the crime. The convicting court also denied a motion for suppression which Petitioner made based on numerous admitted illegal searches of Sprecher's law office by the SEC's agent Louis Foti ("Foti"), the government's main witness at Sprecher's criminal trial. The convicting court, without any hearing, denied the suppression motion "on the basis of the record as a whole which I don't think contains any basis for belief that the government is using any fruits of any illegal search or seizure." The government

originally charged Sprecher with violations of 17 C.F.R. 240.10b-5 ("10-b"), but withdrew the charges. The government requested that as part of Sprecher's sentence, the court require restitution. The court imposed a fine only for the cost of Sprecher's incarceration.

Criminal Appeal

Sprecher appealed his conviction on numerous grounds including (i) that the shares which were the subject of the conspiracy were not required to be registered pursuant to Section 4(1) of the Act (15 U.S.C. 77d[1]) ("4[1]"), (ii) that "materiality" was a required element with respect to false statements under the securities law and the government should not be allowed to utilize 1001 for security law violations. Particularly the Second Circuit should reconsider its decision in *U.S. v. Bilzerian*, 926 F.2d 1285 (2nd Cir., 1991). The government's response was that whether the shares were exempt from registration was immaterial with respect to a conspiracy charge, since pursuant to *U.S. v. Giordano*, 639 F.2d 245 (2nd Cir., 1982) Sprecher could be found guilty of conspiracy even if the shares were exempt from registration. All that was required to sustain a conspiracy charge was "an agreement and an overt act in furtherance of the agreement." There was no requirement that the government prove "that the objective of the conspiracy has been, or could have been achieved."

The government additionally argued that the Second Circuit should not reverse its decision in *Bilzerian*, op. cit., and materiality was not required to be proven to sustain Sprecher's conviction for false statements under 1001.

The Second Circuit upheld Sprecher's conviction but vacated the sentence (*U.S. v. Sprecher*, 968 F.2d 318 [2nd Cir., 1993]). In order to insure that no precedential value be given to a series of misstatements of law in the district court's decision, the Second Circuit explained that it

sustained the conviction for "substantially the reasons" stated by the district court.

Resentence

At Sprecher's resentencing, he argued that a cost of incarceration fine was impermissible. The court therefore, reimposed the fine for other reasons. In Sprecher's appeal on the denial of his post conviction motion, the government argued that the district court calculated the fine by "measuring the loss that would have ensued from the planned sale."

Post Conviction Motion

Sprecher made a post conviction motion. One of the grounds of the motion was that the government's main witnesses, Foti, committed perjury when he testified that no one in the government had told Foti that he could be prosecuted for a crime that Foti committed after he became a government agent in violation of his cooperation agreement. Sprecher argued that Foti committed this perjury in order to conceal an agreement with the government. The district court denied Sprecher's motion holding that if one read the part of Foti's testimony relating to the failure of anyone in the government telling Foti he committed a crime in conjunction with other testimony, Foti's testimony "was not clearly false".

Civil Case

After Sprecher's conviction, the SEC, on December 12, 1992, filed a complaint in the D.C. district court alleging violation of 10b-5 and actual sale of unregistered securities. On December 10, 1993 after the submission of various motions without any hearings or oral argument, the district court granted summary judgment to the SEC as well as certain relief. The district court held (i) that summary judgment was appropriate since Sprecher was convicted and the criminal conviction *collaterally estopped* relitigation (A13), (ii) that unclean hands was not a defense

against an SEC action (A13), (iii) that 15 U.S.C. 78u(g) (78u[g]) provided an absolute bar against any counterclaims against the SEC in an injunctive action brought by the SEC (A15), (iv) that pursuant to 15 U.S.C. 78u(d)(2) ("Remedies Act"), an officer bar could be imposed and disgorgement was appropriate (A14-15).

Civil Appeal

Sprecher appealed arguing that:

(1) a conviction for conspiracy does not provide for *collateral estoppel* with regard to charges concerning the underlying acts and that any findings by the criminal court which were not necessary for the conviction such as actual requirement for registering the shares or affiliate status could not form the basis for *collateral estoppel*, and that the shares were exempt from registration pursuant to §4(1) of the Act. Indeed, the shares had been sold after the time period of the conspiracy alleged at Sprecher's criminal trial;

(2) that the criminal conviction certainly could not provide *collateral estoppel* with regard to 10b-5 violations since the government had, in Sprecher's criminal case, withdrawn such charges. Moreover, an element required for 10b-5 was materiality which the government argued and the criminal court held was not required for 1001 violations - the charge Sprecher was convicted of;

(3) that the SEC was equitably estopped from bringing the action since the SEC had at all times known, through its agent, Foti, of the conspiracy, had encouraged the conspiracy, had caused the sale of the shares and, indeed, had allowed its agent, Foti to sell shares which it, at the civil action, alleged were restricted;

(4) that an officer bar could not be imposed since the acts committed by Sprecher occurred prior to the passage of the Remedies Act. Any imposition of a penalty based on the Remedies Act was barred by the presumption against retroactivity (*Landeraf v. U.S.I. Film Products*, 114 S.Ct. 1483 [1994]), nor could the district court impose the injunction of an officer bar based upon its inherent powers since Sprecher was not an officer and his acts were antithetical to his being an officer. Any officer bar would therefore be a penalty and an injunction cannot be used to penalize an individual. (The district court, realizing this fact based its decision solely on the Remedies Act and granted an officer bar without any hearing.) (A14-15);

(5) That disgorgement violated the double jeopardy clause of the Constitution since the government, at Sprecher's sentencing, requested restitution which was not granted even though the convicting court, pursuant to the Guidelines, would have been required to impose restitution if the government had proven that Sprecher's activities resulted in a loss to third parties. The government's request for disgorgement (another name for restitution) at a later civil suit was contrary to the double jeopardy clause. The district court's granting of disgorgement without any hearing to determine if Sprecher's activities resulted in a loss to third parties based solely on his criminal conviction was contrary to due process including the rules of *collateral estoppel*.

(6) That the district court's decision barring Sprecher's counterclaims based on 78u(g) was incorrect. Rule 78u(g) is just a venue statute.

Appeals Court Decision

The appeals court, rather than addressing the issues Sprecher presented sustained the district court based

upon determinations and principles not enunciated by the district court. In arriving at its decision, the appeals court additionally followed the district court in concluding that any and all facts purportedly[1] determined by the district court convicting Sprecher provided *collateral estoppel* in the SEC's civil suit. The appeals court:

(1) held a statement regarding who had control over the company and merger negotiations were material "as a matter of law" and, therefore, without a hearing regarding materiality, Sprecher was guilty of violating 10b-5 (A5-6);

(2) relied on the criminal court's determination that Sprecher was an affiliate (A6). In making this determination, the criminal court held (*Sprecher*, op. cit. 159) that "influence on management and policies" was the test for affiliate status;

(3) sustained the officer bar based on the equitable powers of court even though the district court had not based

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[1] The term "purportedly" is utilized since several factual errors are contained in the appeals court's decision. There cannot be any dispute as to these errors since the criminal court's findings are a matter of record. (i) The criminal court did not find that Sprecher and Roth (the individual who sold Sprecher the stock) were affiliates after March 31, 1988 (*U.S. v. Sprecher*, 783 F.Supp 133, 159 [S.D.N.Y., 1992]). The shares were obtained from Roth in June, 1988 and therefore, the appeals court determination that Sprecher and Roth were affiliates at the time the shares were bought from Roth and at the time the shares were sold by Sprecher (A6); is contrary to the determination of the convicting court, is incorrect and unsupported by any finding in the record. (ii) The fine imposed on Sprecher was not for costs of incarceration. The criminal court originally imposed the fine for costs of incarceration, but this sentence was vacated (*U.S. v. Sprecher*, 988 F.2d 318 [2nd Cir., 1993]). The fine was then imposed at Sprecher's resentencing, according to the government, for "loss".

its decision on its equitable powers and no hearing was held (A7).

(4) Sustained disgorgement holding, contrary to the facts, that the criminal court imposed the fine based on costs of incarceration (A7).

(5) Sustained the dismissal of equitable estoppel claims and countersuits predicated upon the denial of a motion for suppression by the criminal court (A6).

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Aside from the facts contained in "I. Procedural History" (*supra.*), the following facts are material:

(1) The district court as well as the appeals court relied entirely for their decision on the conclusions made by the criminal court convicting Sprecher. No hearing of any kind was provided with respect to the SEC's civil suit.

(2) At all times throughout the conspiracy which Sprecher was convicted of, Foti was an agent of the SEC and the SEC encouraged Foti to engage in the conspiracy and allowed Foti to arrange mergers and to sell shares which in the civil suit against Sprecher, it alleged were restricted.

(3) Sprecher was never an officer or director of the company.

REASONS FOR GRANTING THE PETITION

The D.C. circuit's decision regarding *collateral estoppel* is contrary to the Fifth Amendment of the Constitution, all other circuits and decisions of this Court. The D.C. circuit's decision concerning affiliate status and "per se" materiality conflicts with all other circuits, the Securities

Act and this Court's decisions. Under the D.C. circuit's ruling, any negotiator, friend, advisor, would be an affiliate. The D.C. circuit's decision regarding an officer bar and disgorgement is contrary to the Fifth Amendment, this Court's decision as well as all other circuit decisions regarding the limitation of the injunctive power of a court. An injunction cannot be used as a penalty. Moreover, it is an obvious attempt to bypass this Court's recent decisions barring retroactive application of legislation. Pursuant to the D.C. circuit decision without any hearing, or even contrary to the determination of the district court, an appeals court could sustain, based upon its inherent power, penalties which are, in essence, retroactive legislation. The whole bar against retroactive application of penalties would be meaningless.

The fact that the decisions are not published does not in any way diminish their importance or precedential value. In these days of West Law and Lexis, the decisions will be used as a precedent especially by the SEC, who relies, as it did in the instant case, on numerous unpublished decisions.

I. The Appeals Court Erred in Holding That a Criminal Court's Findings Which Were Not Necessary for its Determination of Guilt Provided *Collateral Estoppel* or *Res Judicata*.

The D.C. appeals court, unlike the district court, apparently realized that a conviction for conspiracy does not provide any *collateral estoppel* effect with respect to the underlying violation. In Sprecher's case, the government was aware that there was no actual violation and therefore, charged conspiracy which has a different burden of proof. Indeed, the government argued at Sprecher's appeal, relying on *U.S. v. Feola*, 420 U.S. 671 (1975), that in order to sustain a conspiracy conviction, all that had to proven was an agreement "and an overt act." It was inconsequential if an actual violation had occurred or

whether the violation could have occurred (*Giordano*, op. cit.)

What the D.C. appeals court apparently failed to realize was that in order for *collateral estoppel* to apply, the issue must be "*necessarily* determined by a court of competent jurisdiction" (emphasis added) (*Montana v. U.S.*, 440 U.S. 147, 153 [1979]). This requirement is readily understandable since any tangential issue is not actually contested and even if it were, is not considered by an appeals court. In Sprecher's case, the appeals court did not have to consider whether the shares actually required registration.

The D.C. appeals court's basis for arriving at their decision as to the actual sale of unregistered stock by Sprecher, rejecting Sprecher's equitable estoppel claims and counterclaims (A6), aside from being factually flawed, were based upon decisions by the criminal court which were not necessary to its determinations and/or involved issues which had different standards, and were unrelated to Sprecher's claims in the civil suit. The determination by the D.C. appeals court based upon *collateral estoppel* deprived Sprecher of his due process rights. Whether Sprecher was an affiliate was entirely unnecessary for the determination of guilt in Sprecher's conspiracy trial. Indeed, the government's choice of a conspiracy charge for an impossible goal clearly demonstrates that Sprecher was not guilty of the actual violation. The fact that the government did not use the fruits of its admitted illegal searches, while relevant to a suppression motion, is entirely irrelevant to a counterclaim based on these searches or an equitable estoppel defense.

While this Court may believe that the issue of *collateral estoppel* need not be addressed since the law is that well settled, such is not the case. In Sprecher's case, two district courts and an appeals court misunderstood the

principles of *collateral estoppel*. Just as this Court in *Landeraf*, op. cit., *Rivers v. Roadway Express*, 114 S.Ct. 1510 (1994) and *Plaut, et al. v. Spendthrift Farm*, ___ S.Ct. ___ (1995) had to reiterate the principles of retroactivity, the court should issue definite guidelines for *collateral estoppel* and *res judicata*, especially as these principles relate to criminal convictions and determinations. The government is constantly bringing charges of conspiracy and using the convictions for *collateral estoppel*, thereby denying convicted individuals of due process.

II. The Appeals Court Erred in its Holding That Affiliate Status for Purposes of the Security Laws Is Determined by "Influence" Rather than by "Control".

The criminal court convicting Sprecher made a determination that Sprecher was an affiliate since he "was an active participant in and major influence" on the "management and policies of World Wide" (*Sprecher*, op. cit. 159). This issue, of course, was never litigated at trial or in the Second Circuit since it was not necessary to the determination and was entirely unrelated to Sprecher's conviction for conspiracy. The D.C. appeals court, by accepting the criminal court's determination of Sprecher's affiliate status (A6), accepted the rationale for the criminal court's standard - *influence*. The Securities Act of 1933 (15 U.S.C. 77) explicitly explains that the standard is "*control*." All regulations issued by the SEC use the standard of control, e.g., 17 C.F.R. 230.144, , 17 C.F.R. 230.405, 17 C.F.R. 240.12b(2) and this is the standard accepted by this Court and all circuits.

If the D.C. appeals court decision is allowed to stand, the SEC will argue that in reality, influence is the standard and any individual who acts as a finder, negotiator, advisor will automatically become an affiliate, thereby preventing the smooth operation of the securities market.

III. The Appeals Court Erred in Holding That Any False Statement Concerning a Merger or Control Was *Per-se* Material.

The D.C. circuit applied a per-se rule as to materiality holding that false statements concerning who had control of a company or merger negotiations were material per-se (A5-6). In arriving at this conclusion, the D.C. circuit relied on *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976). In *TSC Indus.*, op. cit. 449, this Court rejected the per-se rule of materiality and insisted that the circumstances be considered. Other circuits have, following this Court's holding, refused to accept a per-se rule. The 9th Circuit, in *U.S. v. Bingham*, 992 F.2d 975 entirely rejected the per-se rule and reversed the conviction of an individual who failed to disclose he was an officer and a director and lied as to his name. The 9th Circuit, rather, held that director or officer status was not always material.

To better understand the far-reaching nature of the D.C. circuit's per-se rule, it is necessary to consider one of the false statements which the D.C. circuit considered per-se material. The SEC complained that a statement in a 10Q regarding "no prospect" was materially false.

The "no prospect" statement in its entirety stated:

> "While new management has been elected, this new management is in the identical position of the old management in that they are actively seeking potential businesses to acquire. The Company's limited resources are such that only a Company who would desire to use the public trading nature of the company would agree to a merger or acquisition. If that should occur, and at the present time, there are no prospects of that occurring, such a merger or such an acquisition would in all probability result in

> change of management. The Company's chances of locating a business which would desire to utilize the public trading nature of the Company has diminished significantly due to the recent stock market crash which has resulted in many companies changing their view point as to the desirability of being publicly traded."

It is not denied that the statement was true. The one merger which was entered into was declared void *ab initio* under a court ordered stipulation. No other merger occurred, the statement was, therefore, true both prospectively and retrospectively.

The criminal court, when faced with the argument of lack of materiality, explained that pursuant to 1001, materiality was not required (*Sprecher*, op. cit., 133). It would appear that the criminal court held that this statement was still actionable under 1001, presumably because the individuals believed that there was perhaps a one percent chance and therefore, stating no prospect was false and knowingly false.

The no prospect statement is additionally protected under the Safe Harbor provisions concerning future projections (*Levine v. N.L. Industries*, 720 F.Supp. 305, 306 [S.D.N.Y., 1989]).

Having such a per-se rule would destroy the entire concept of materiality and make every statement made by a company or individual subject to an immediate summary 10b-5 action even if the statements were protected by a Safe Harbor provision. In this context, the court should consider whether 1001 can be applied to security law violations or whether the Second Circuit erred in *U.S. v. Bilzerian*, op. cit.

IV. The Appeals Court's Sustaining of Disgorgement Was Contrary to the Due Process and Double Jeopardy Clause of the Constitution.

The D.C. circuit sustained the granting of disgorgement *inter-alia* stating incorrectly that Sprecher's fine was for cost of incarceration. Putting aside the factual inaccuracy, the court did not address the issue of violation of the double jeopardy and due process by imposing disgorgement on Sprecher based solely upon his criminal conviction without any hearing. In what could only be considered paradoxical logic, the D.C. circuit court ("DC") accepted the criminal court's findings as to Sprecher's guilt as the basis for the DC granting disgorgement, but ignored the criminal court's failure to grant restitution and the government's failure to appeal the decision of the criminal court. If restitution (disgorgement) were appropriate pursuant to Guideline 5E1-1, 18 U.S.C. 3663, any failure by the criminal court to impose restitution where restitution was proper would have resulted in the government winning an appeal amending the sentence to include restitution. Being aware that appealing the issue might open the entire issue of whether Sprecher had actually violated any security law in front of an appeals court familiar with all issues, the government chose to violate the due process and double jeopardy clauses of the Constitution by bringing another suit and arguing *collateral estoppel* for summary judgment.

Sprecher, by the government's tactics had to defend himself in two separate proceedings to avoid disgorgement, contrary to the double jeopardy clause (*Burke v. U.S.*, 437 U.S. 1, 98 [1978]). In the first suit he won, in the second suit he lost, and in the second suit, he was not even given the opportunity for a hearing adding a violation of due process to the violation of double jeopardy.

V. The Appeals Court Sustaining of an Officer Bar Was Contrary to the Due Process Clause of the Constitution and Involved the Use of an Injunction for the Imposition of the Penalty.

At the district court level, the SEC presented various arguments for an officer bar. The D.C. district court, unlike the district court in *SEC v. Drexel Burnham Lambert*, 837 F.Supp. 587 (S.D.N.Y., 1992), and *SEC v. Posner*, 16 F.2d 520 (2nd Cir.,1994), *sub nom* held no hearing and accepted only one argument, the penalty provided by 15 U.S.C. 78u(d)(2), the Remedies Act. In *Posner*, op. cit., the district court based its decision of an officer bar on its inherent powers as well as the Remedies Act.

After the D.C. district court decision, this Court entered its decisions in *Landeraf*, op. cit. and *Rivers*, op. cit., explaining that the presumption against retroactivity prohibits the imposition f retroactive penalties. All of Sprecher's acts occurred prior to the passage of the Remedies Act. Sprecher, as part of his appeal, relied on these holdings in *Landeraf* and *Rivers*, op. cit.

The D.C. circuit in an obvious attempt to nullify this Court's decision held relying on *Posner*, op. cit., that an officer bar was appropriate based upon the inherent powers of the district court (A7). Another paradoxical decision since the district court did not exercise its powers for obvious legal reasons.

Sprecher's purported acts, unlike *Posner*, op. cit., were not related to his being an officer and indeed, were antithetical to his being an officer. If Sprecher were an officer, there could never have been a conspiracy since no amount of backdating would allow an officer to sell unregistered shares. Moreover, the officer bar relates to 12(g) companies. The company regarding which the conspiracy was charged was not a 12(g) company.

Therefore, the officer bar injunction is a penalty unrelated to the crime contrary to the decisions in *U.S. v. Campbell*, 897 F.2d 1317 (5th Cir., 1990), and *NLAB v. Express Publishing Co.*, 312 U.S. 426 (1941).

The D.C. circuit, by ignoring the district court's refusal to base its decision on its inherent powers, ignored the direction of this Court that with respect to injunctions, the district court's opinion must be given great deference unless there was an abuse of discretion (*U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633, *Union Tool Co. v. Wilson*, 259 U.S. 107, 112). In the instant case, the district court was aware of the limitations of its powers, but was unaware of the presumption against retroactivity since *Landeraf*, op. cit., had not been decided. The D.C. circuit on the other hand, in an attempt to nullify this Court's decision, abused its powers.

The D.C. circuit additionally ignored the requirement for a hearing to determine the reasonable likelihood of illegal conduct. In *Posner*, op. cit., such a hearing was held. (*See* also *Tanzer v. Huffines*, 408 F.2d 42 [3rd Cir., 1969], *SEC v. Bausch and Lomb, Inc.*, 565 F.2d 8, 18 [2nd Cir., 1977]). The fact that Sprecher was convicted of perjury does not make it more likely that he would commit security violations especially since he was not convicted of security violations. If the D.C. circuit's decision is not reversed, district courts will be deprived of their discretions, injunctions will be used as penalties and a separate class of citizens will be created. Anyone convicted of perjury, no matter how technical the perjury, would be deprived of being an officer.

CONCLUSION

For the reasons hereinabove set forth, Petitioner respectfully submits that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN G. SPRECHER
Pro-Se
138-49 77th Avenue
Flushing, New York 11367
(718) 268-5598

Dated: August 10, 1996